February 3, 2003

VIA ELECTRONIC SUBMISSION

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: ***Ex Parte* presentation in CC Docket No. 01-338, CC Docket No. 96-98, and CC Docket No. 98-147**

Dear Ms. Dortch:

Broadview Networks, Inc.; Dominion Telecommunications, Inc.; Eschelon Telecom Inc.; Grande Communications; KMC Telecom; NewSouth Communications, Inc.; NuVox, Inc.; PACE Coalition; SNiP LiNK LLC; Talk America, Inc.; XO Communications, Inc. and Xspedius Management Co., LLC (collectively, the "Responding CLECs"), by their attorneys, hereby respectfully respond to the *ex parte* letter submitted by SBC Communications, Inc., BellSouth Corporation, and Qwest Communications International, Inc. (collectively, the "RBOCs") in the above-referenced proceedings on January 21, 2003 ("RBOC Letter"). Specifically, we rebut each of the three main arguments advanced in the *RBOC Letter*.

First, the Commission should not accept the RBOCs' invitation to run roughshod over the change-of-law provisions in State commission-approved interconnection agreements as it issues an order in its *Triennial Review* proceeding. Rather, existing change-of-law provisions should be allowed to operate according to their terms as approved by State commissions. Second, the implementation of any Commission rules adopted in the *Triennial Review* docket cannot displace the negotiation and arbitration procedures of the Communications Act of 1934, as amended (the "Act"), in particular Section 252.[1] Third, the Commission's removal of any unbundled network element ("UNE") from the national UNE list in the *Triennial Review* proceeding, were it to occur, does not warrant any changes in the current operation of the pick-and-choose provisions

[1] 47 U.S.C. § 252.

of the Act or the Commission's Rules. In short, whatever rules the Commission adopts in the *Triennial Review* proceeding, they must be implemented in a manner that does not subvert the regulatory framework established by Congress that is founded upon *both* non-discrimination requirements *and* negotiated and arbitrated interconnection agreement provisions that are subject to State commission review and approval.

1. ***Change of Law Provisions.*** As the *RBOC Letter* acknowledges, "there are a variety of change-of-law provisions in existing interconnection agreements." *RBOC Letter* at 2. Some may be triggered by any change in federal or state law or applicable agency rules. Others may be triggered only by changes in regulations or in the law that render provisions of the interconnection agreement unlawful. Yet others may only apply to specific provisions of the agreements to which the change-of-law provisions expressly identify. Other change-of-law provisions meet none of the foregoing categories and are differently structured or contain elements of more than one category. Despite this tremendous variety, the *RBOC Letter* attempts to reduce all change-of-law provisions to one generic type: those that remove the obligation to unbundle a network element upon a Commission finding that such an element no longer *must* be unbundled under Section 251(c)(3) of the Act because it no longer meets the impairment test under Section 251(d)(2).

There is no reason to conclude that all change-of-law provisions are of this sort. For example, where the change-of-law provision applies only where changes in law render adherence to an agreement's provisions unlawful, the fact that the Commission delists an element from Section 251(d)(2) does not render a *negotiated* obligation to unbundle that element unlawful.[2] Under Section 252(a)(1) of the Act, negotiated provisions need not adhere to the strict requirements imposed on ILECs under Sections 251(b) and (c) of the Act, including the unbundling obligations under Section 251(c)(3).[3] In other words, an ILEC could agree to unbundle an element even though it is not on the Commission's minimum list of UNEs or agree to unbundle it for the term of the agreement without condition upon changes in agency regulation.[4]

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[2] The *RBOC Letter* incorrectly assumes, as it must to sustain its argument, that all interconnection agreements are, in effect, arbitrated and "subject to the Commission's rulemaking authority." *See RBOC Letter* at 4. This assumption is not warranted as a generic matter and must be considered on a case-by-case basis.

[3] *See* 47 C.F.R. § 252(a)(1).

[4] Even though the Commission does not require a network element to be unbundled under Section 251(d)(2), where a State commission lawfully requires the element to be unbundled (for example, under Section 251(d)(3) of the Act, 47 U.S.C. § 251(d)(3), or State law), the Commission's delisting of the element does not result in a change of law regarding the obligation of the ILEC to unbundle that element in any event. Further, RBOCs that have received Section 271 authority to provide in-region interLATA services would be under an obligation to unbundle certain network elements under cost-based rates even after those elements are delisted by the Commission. *See, e.g., ex parte* Letter of Brad E. Mutschelknaus, Kelley Drye & Warren LLP, Counsel for Broadview Networks, Inc., *et al.* to Marlene H. Dortch, Secretary, FCC, CC Dockets Nos. 01-338 *et al.*, dated January 21, 2003; *ex parte* Letter of Robert A. Curtis, President, Z-Tel Network Services, to Michael K. Powell, Chairman, *et al.*, CC Docket Nos. 01-338 *et al.* dated December 20, 2002 ("Z-Tel Letter"), attached to *ex parte* Letter of Christopher J. Wright, Harris,

With a change-in-law provision that is triggered only when the subsequent law renders certain provisions unlawful, therefore, the change in federal law regarding unbundling obligations does not necessitate a change in the agreement. Accordingly, at the very minimum, because of the diversity of change-of-law provisions in interconnection agreements, it would be unwise and unsound for the Commission to attempt to make any general proclamations regarding their applicability or inapplicability in the wake of the *Triennial Review*.

Leaving aside the Commission's adoption of modified unbundling rules in this proceeding, the *RBOC Letter* also contends that if and when the D.C. Circuit's decision regarding the Commission's most recent unbundling rules[5] becomes final and nonappealable, "the legal obligation upon which the existing interconnection agreements are based will no longer exist."[6] As an initial matter, the *RBOC Letter* incorrectly characterizes the *USTA* decision as vacating the Commission's unbundling rules wholesale. The D.C. Circuit Court did no such thing, vacating only the Commission's line sharing rules, although the court did remand the Commission's unbundling rules as a whole for further consideration.[7] Consequently, at a minimum, any suggestion that the change-of-law provisions might be triggered by the *USTA* decision once it becomes final and non-appealable is based upon an incorrect factual premise.

The RBOCs also base their argument regarding the effect the finality of the *USTA* should have on an incorrect legal premise, namely that federal unbundling obligations arise solely out of the Commission's regulations. In reality, at least a minimum of federal unbundling obligations arise principally *under the Act* itself, not the Commission's Rules which are simply designed to implement the Act's obligations. 47 U.S.C. § 251(c)(3). Indeed, the principle that unbundling obligations arise from the Act itself is the basis of several RBOC arguments in this proceeding regarding the ability of State commissions to adopt additional unbundling requirements. The RBOCs have been arguing in this and prior proceedings that the standards in Section 251(d)(2) inevitably require the Commission to establish a list of UNEs which is both a minimum *and a maximum*, which the States may not add to or otherwise alter.[8] The premise of that argument is

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Wiltshire & Grannis, LLP, Counsel to Z-Tel Communications, Inc., to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-338 *et al.*, dated December 20, 2002.

5 *United States Telecom Ass'n v. FCC*, 290 F. 3d 415 (D.C. Cir 2002), *pet'n for cert. pending*, No. 02-858 (U.S. filed Dec. 3, 2002) ("USTA").

6 *RBOC Letter* at 2.

7 *Compare USTA*, 290 F.3d at 425-28 (Commission's unbundling rules remanded for clearer articulation and application of the impairment standard) *with id.* at 429 ("the Line Sharing Order must be vacated and remanded")

8 *See, e.g.,* Letter of Herschel L. Abbott, Jr., BellSouth, et al to Michael K. Powell, Chairman, FCC, dated November 19, 2002 The Responding CLECs disagree with this view and believe that the States have the ability and authority under several provisions of the Act to add to the list of UNEs adopted by the Commission under Section 251(d)(2). *See, e.g., ex parte* Letter of Edward A. Yorkgitis, Jr., Kelley Drye & Warren LLP, counsel for Talk America, Inc, to Marlene H. Dortch, Secretary, FCC, CC Dockets Nos. 01-338 *et al.,* Attachment at 2-3, dated November 15, 2002 ("Talk Letter Attachment") (discussing State authority to adopt unbundling requirements under Sections 261(c), 252(e)(3) and 251(d)(3)); *Z-Tel Letter, supra,* at 7-9 (discussing State authority under Sections 251(d)(3) and 252(e)(3)).

that the obligation to unbundle a network element has its sole source in the Act, and even the Commission does not have the ability to deviate from what the Act requires and prohibits.[9] While the Responding CLECs disagree that the Commission has the sole authority to adopt unbundling regulations, they do agree that the Act itself creates an obligation for ILECs to unbundle at least a minimum set of network elements. Moreover, assuming for the moment that the D.C. Circuit vacated the Commission's unbundling rules in *USTA* (which the Responding CLEC also dispute), there can be no reasonable argument that the court completely relieved the ILECs from unbundling even the minimum list of network elements required *under the Act*. Consequently, even assuming a *vacatur* of the Commission's unbundling rules in *USTA*, whether the obligation to unbundle a specific network element is or will be affected by the decision in *USTA* once it becomes final must be examined on a case-by-case basis. Factors that must be considered in such an examination include, but are not limited to, (i) the terms and conditions of the parties' change-of-law provisions in their interconnection agreement, (ii) whether each contractual provision potentially affected by the change-in-law provision was negotiated or arbitrated, and (iii) whether, despite the *vacatur*, there was and is an obligation under the standards of the Act (or under State law or regulation) for the ILEC to unbundle each network element at issue.

Turning to unbundling rules the Commission adopts in this *Triennial Review* proceeding, the Commission may not simply override the change of law provisions in approved interconnection agreements to require the new rules to become effective immediately with respect to parties with such agreements, for the same reasons that the D.C. Circuit's action in *USTA*, even if a *vacatur*, does not mandate an automatic and wholesale amendment of such agreements, as explained earlier.[10] The RBOCs also argue that the so-called *Sierra-Mobile* doctrine gives the Commission the authority to take such a generic action upon the issuance of rules in the *Triennial Review* proceeding.[11] There are several problems with the *RBOC Letter's* invocation of that doctrine to support a revision of all existing interconnection agreements. First, the *Transmission Access Policy Study Group* case cited by the *RBOC Letter* is the *only* case the Responding CLECs could find in which a court has made a public interest finding warranting under the doctrine *generic* contract revision by a federal agency, which led the D.C. Circuit to stress that whole classes of contracts are to be modified under the doctrine only in "rare

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[9] Certainly, any UNEs that the Commission must provide following this *Triennial Review* proceeding, even if only on a transitional basis, must have been an ILEC's obligation to provide under the Act *for the entire period prior to the completion of this proceeding.* The *RBOC Letter's* implications to the contrary in light of their argument regarding the effect the finality of *USTA* decision will have on unbundling obligations for the period prior to the effectiveness of rules adopted in the *Triennial Review* docket – namely to negate any obligation to unbundle during that period – are preposterous.

[10] If the Commission adopts a set of unbundling requirements in its *Triennial* Review proceeding that are less comprehensive than those that were in place prior to the *USTA* decision, it will be doing so because of a determination that today (*i.e,.* early 2003), circumstances are such that the impairment standard is no longer met for certain elements, not that such UNEs were unlawfully established in prior decisions. The Commission should avoid any suggestion to the contrary in its order in this proceeding.

[11] *RBOC Letter* at 3.

circumstances."[12] Indeed, even in that case the court noted that "case-by-case [public interest] findings . . . will, in effect, be made when the Commission determines whether to approve a proposed stranded cost amendment to a particular contract." [13] Here, under the RBOCs' proposal, contracts would be amended wholesale without any agency review by the State commissions where the agreements were filed and approved, let alone by the agency – *i.e.*, the Federal Communications Commission – that would be seeking to invoke the doctrine on a generic basis.

Second, the *RBOC Letter* relies upon only a basic "public interest" finding of the sort associated with generic rulemaking, specifically that supporting the adoption of unbundling rules in this proceeding.[14] But the D.C. Circuit has emphasized "the 'public interest' that permits [an agency] to modify private contracts is different from and more exacting than the 'public interest' that [the agency] seeks to serve when it promulgates its rules."[15] The RBOCs offer no basis for such a "different and more exacting" public interest finding in this case.[16]

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12 *Transmission Access Policy Study Group v. FERC*, 225 F.3d 667, 711 (D.C. Cir. 2000). The Federal Energy Regulatory Commission action at issue in this particular case that justified invocation of the *Sierra-Mobile* doctrine "fundamentally change[d] the regulatory environment in which utilities operate, introducing meaningful competition into an industry that, since its inception, ha[d] been highly regulated." *Id.* This *Triennial Review* proceeding will, no matter the potential impact on individual companies, represent for the telecommunications industry something far short of the fundamental change which was the subject of FERC Order 888 in the *Transmission Access Policy Study Group* case, which introduced competition into a previously highly-regulated monopolistic industry

13 *Id.* at 711 (quoting FERC Order 888).

14 *See RBOC Letter* at 4. The *RBOC Letter* also relies upon the alleged public interest in the uniform implementation of its rules eventually adopted in this proceeding (at 4), but it is hard to see why an interest in uniform implementation of the unbundling rules issued in this *Triennial Review* is sufficient to override existing approved interconnection agreements, as no other rules adopted by the Commission to implement Section 251 or 252 caused the Commission to revise existing State commission approved agreements. *See, e.g., Intercarrier Compensation for ISP-Bound Traffic*, 16 FCC Rcd 9151, 9189 (¶ 82) (2001) (subsequent history omitted) ("ISP Remand Order"). Sufficient uniformity of application and implementation of the new rules will be assured because ILECs generally will be subject to the new rules as requesting carriers seek to negotiate new or revised agreements once the rules take effect.

15 *Texaco, Inc. v. FERC*, 148 F.3d 1091, 1097 (D.C. Cir. 1998), quoted by *Transmission Access Policy Study Group, supra,* at 225 F.3d at 709. *See also IDB Mobile Communications, Inc., v. COMSAT Corp.*, 16 FCC Rcd 11474,11480-81, ¶¶ 15-16 (2001) (threshold for contract revision under the *Sierra-Mobile* doctrine "is much higher than the threshold for demonstrating unreasonable conduct under Sections 201(b) and 202(a) of the Act").

16 The *RBOC Letter* (at 5) suggests that negotiated interconnection agreements are, in effect, freely subject to the *Sierra-Mobile* doctrine due to the fact that the standard for State commission approval in Section 252(e)(2)(A) of the Act invokes consistency with the "public interest, convenience and necessity." This standard is, at most, more akin to the generic public interest standard, especially as it has been applied by State commissions when reviewing negotiated agreements and provisions. Any attempt to confuse that standard with the "more exacting" public interest showing required under the *Sierra-Mobile* doctrine is blatant overreaching. Indeed, a negotiated agreement that included an unbundled network element not specifically on the Commission's list most assuredly would not be rejected under the Section 252(e)(2)(A) public interest standard. Clearly, the applicability of the Section 252(e)(2)(A) standard to negotiated interconnection agreement approval cannot provide the basis for wholesale revision of approved agreements.

Third, the cases which the *RBOC Letter* cites in support of the application of the *Sierra-Mobile* doctrine in which contract modification was upheld involve situations in which the agency at issue retained prescriptive power over the subject matter of the contracts, typically over rates, and the agreements were filed with the agency.[17] The present circumstances present a fundamentally distinct picture for at least three reasons: one, Section 252 interconnection agreements regarding access to network elements frequently include negotiated UNE provisions not subject to Commission rules;[18] two, these agreements are typically subject to change-of-law provisions by which their revision as a result of subsequent changes in law is already contemplated; three, the agreements must be filed with the States, *not* the Commission, giving the States the principal jurisdiction over these agreements, and especially over negotiated provisions that are not subject to the requirements of the Act of the Commission's Rules.[19] In short, the unique structure governing interconnection agreements adopted by Congress in the Telecommunications Act of 1996 (the "1996 Act") differentiates the current situation from those earlier instances cited by the *RBOC Letter* in which the Commission provided fresh-look opportunities over contracts that were exclusively under the FCC's regulatory jurisdiction.

Further, because Section 252(e) unequivocally requires State commissions to review and approve interconnection agreements, the Commission has no authority to approve Section 252

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[17] *See, e.g., Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999) (Commission under Section 205(a) of the Act has prescriptive regulatory authority over international settlement rates contained in agreements between Title II and non-Title II common carriers filed with the Commission under section 211(a)). In *Western Union Tel. Co. v. FCC*, 815 F.2d 1495 (D.C. Cir. 1987), the court reversed an attempt by the Commission to abrogate a six-month change-in-rates notice provision in a settlement agreement the Commission itself had previously approved to allow what the Commission deemed to be lawful rates take effect between the parties affected. At bottom, the court found that the notice provision, which is analogous to the change-of-law provisions at issue here in that both types of provisions provide procedural protections before the arrangements between the parties can be modified, were integral parts of the settlement agreement not subject to Commission abrogation. *Id.* at 1503-1504. Although the settlement agreement in that case had been approved by the Commission, the change in the notice provisions was not permitted by the court, underscoring the insurmountable hurdle the Commission would face were it to seek to modify agreements filed with and approved by State commissions. Further, the CMRS-LEC agreements at issue in the 1996 *Local Competition Order*, 11 FCC Rcd 15499, 16044-45 (1996) (subsequent history omitted) pre-dated the 1996 Act, and so were not Section 252 agreements filed with State commissions. Rather, these were agreements whose terms fell under the Commission's preemptive jurisdiction under Section 332 of the Act.

[18] *See* 47 U.S.C. § 252(a)(1) (negotiated provisions may be entered into without regard to obligations under Sections 251(b) and (c)).

[19] In fact, under Section 252(e), it is the State commissions that are required to make generic public interest findings regarding negotiated portions of interconnection agreements when considering them for approval, and adherence with Commission rules is not even a consideration. 47 U.S.C. §§ 252(e)(2)(A)(i) and (ii). It follows that if certain public interest findings need to be made under the *Sierra-Mobile* doctrine before such agreements are modified or terms such as the change of law provisions are to be overridden, especially in light of the fact that such agreements are not bound to track ILEC obligations under Sections 251(b) or (c) (per Section 252(a)(1)), such findings should be made by the State commissions, rather than this Commission. *See also*, footnotes 3 and 4, *supra*, and accompanying text.

amendments to such agreements (even voluntary ones), let alone modify such agreements on its own authority. The RBOCs, of course, are asking the Commission to modify each existing interconnection agreement outside the existing statutory procedures, something it must not do.[20] Only where a State commission affirmatively fails or refuses to act may a party petition the Commission under Section 252(e)(5) to preempt and assume jurisdiction in the shoes of a State commission, a process which has not taken place here.[21]

Fourth, the Commission has, as the *RBOC Letter* itself acknowledges, already stated that the *Sierra-Mobile* doctrine does not apply to Section 251/252 interconnection agreements.[22] The Commission, were it to consider changing this determination would have to do so through notice and comment rulemaking.[23] The Commission cannot do so within this proceeding because the scope of the Notice of Proposed Rulemaking does not encompass the possible wholesale revision of change-of-law or unbundling provisions in existing approved interconnection agreements or a change in the Commission's earlier determinations regarding the applicability of the *Sierra-Mobile* doctrine to State-commission-approved interconnection agreements. Any such revision in the Commission's application of the law in its imminent *Triennial Review* order would therefore violate the Administrative Procedures Act.

Another reason the Commission should not override change-of-law provisions in existing interconnection agreements is that the parties with the greater bargaining power – the ILECs – are the ones seeking to have existing contractual provisions ignored. One of the primary purposes of the change-of-law provisions (as well as contract term and expiration provisions) is to manage the allocation of risk between the parties that there will be a change in the law after the agreement becomes effective – in this case that there will be a change in the unbundling obligations applicable to incumbent LECs. The ILECs are and have been well aware of the triennial review process integrated into the Act and at every opportunity over the past several

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[20] In addition to stepping outside statutorily proscribed procedures and having the other deficiencies described herein, the sort of regulatory changes affecting existing interconnection contracts the *RBOC Letter* urges the Commission to make are potentially infirm under the Fifth Amendment of the United States Constitution as unconstitutional takings without *any* compensation. A requesting carrier's right to obtain access to a UNE under an approved interconnection agreement (even if that UNE is no longer on the Commission's list of required UNEs) confers a property right on the carrier, which the actions the RBOCs' urge the Commission to pursue would abrogate, not merely impair the value of. Moreover, the potential takings issues are exacerbated because a requesting carrier's property rights embodied in interconnection agreements that would not automatically change as a result of a UNE being delisted were obtained by the requesting carrier precisely to offer protection against the kinds of regulatory changes the ILECs have been seeking within the *Triennial Review* proceeding.

[21] *See, e.g., Starpower Communications, LLC Petition for Preemption of Jurisdiction of the Virginia State Corporation Commission Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996,* 15 FCC Rcd 11277 (2000).

[22] *RBOC* Letter at 5. IDB *Mobile Communications, Inc., v. COMSAT Corp.*, 16 FCC Rcd at 11481, n.50.

[23] *See Sprint Corp. v. FCC*, No. 01-1266, *slip op.* at 4 (D.C.Cir. Jan. 21, 2003) (an agency's imposition of substantive requirements that have a future effect on parties and "change the rules of the game," trigger APA notice requirements).

years have been challenging the legality of the Commission's unbundling rules. If the ILECs wanted to make certain that changes in unbundling regulations were reflected in their agreements as such regulations were modified and became effective, it was incumbent upon them when negotiating or arbitrating their interconnection agreements to ensure that the change-of-law provisions operated as they would like in the hardly unforeseeable circumstances where unbundling rules changed.[24] It appears that the RBOCs are now concerned that they did not lay the groundwork in many or most cases for a transition to modified unbundling rules in their interconnection negotiations and arbitrations, and they now urge the Commission to correct the situation by fiat. In such situations as these, the Commission has stated that "parties should generally 'be required to live with their bargains as time passes and various projections about the future are proved correct or incorrect."[25]

At bottom, the *RBOC Letter* asks the Commission to create and push a "reset button" regarding the application of change-of-law provisions to unbundling obligations in existing interconnection agreements. Such a mechanism does not exist and its creation cannot be justified from a legal or policy standpoint. Rather, each existing approved agreement must operate pursuant to its terms, including its change-of-law provisions. That result is in the public interest because it is inherent in the regulatory framework adopted by Congress in Sections 251 and 252 that is built upon negotiated and arbitrated agreements subject to State commission approval before they become effective.

2. ***Implementation of New Unbundling Rules.*** The Commission should implement any unbundling regulations promulgated in this proceeding in the same way it has generally implemented rules to effectuate the pro-competitive provisions of Sections 251 and 252. Specifically, upon the effective date of the rules, or under any transition periods set forth in those rules, ILECs should be obligated under them in the context of requests by carriers for new or successor agreements and of requests for renegotiation by carriers with existing agreements.[26]

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[24] In this sense, it really does not matter whether the change-of-law provisions in existing agreements are negotiated or arbitrated. Either way, these provisions are not subject to Commission jurisdiction and amendment. If negotiated, change-of-law provisions are not subject to a requirement of consistency with the Commission's Rules when reviewed and approved by State commissions. 47 U.S.C. § 252(e)(2)(A). Negotiated change-of-law provisions are subject to interpretation under State, not federal, law. If arbitrated, change-of-law provisions ostensibly are subject to a requirement of consistency with the Commission's Rules, but the Commission has never adopted rules regarding change-of-law provisions in interconnection agreements, such that arbitrated change-of-law provisions are also purely creatures of state law. *See* 47 U.S.C. § 252(e)(2)(B).

[25] *IDB Mobile Communications, Inc., v. COMSAT Corp., supra,* 16 FCC Rcd at 11482, ¶ 18, quoting *Town of Norwood, Massachusetts v. FERC,* 587 F. 2d 1306, 1312 (D.C. Cir. 1978).

[26] As a number of *ex parte* submissions filed by competitive LECs in this proceeding have made clear, the State commissions retain the ability under Sections 251(d)(3), 252(e)(3), and Section 261(c) of the Act to adopt unbundling requirements beyond those adopted by the Commission under Section 251(d)(2). *See, e.g., Talk Letter Attachment, supra; Z-Tel Letter, supra.* Accordingly, any implementation of the Commission's unbundling rules adopted in this *Triennial Review* proceeding would not negate any unbundling obligations properly adopted by the States on an independent basis under their authority preserved by the 1996 Act or State law, contrary to the suggestions by the *RBOC Letter* (at 6).

In both cases, the time periods for negotiation and arbitration set forth in Section 252 would apply, unless different provisions have been contractually agreed to by the parties. The duty of good faith negotiation under Section 251(c)(1) does not require otherwise, despite the RBOCs' suggestions to the contrary, as that section cannot be interpreted independently of Section 252(a) and (b).[27] There is no basis for the Commission, as the RBOCs request, to alter the time periods *either* agreed to by parties in their interconnection agreements under their change-of-law provisions or the contract term and expiration clauses *or* adopted by Congress as the RBOCs urge the Commission to do.[28]

Indeed, the ILECs have a history of using the procedures created by the 1996 Act or through its implementation by the Commission and State agencies to delay providing requesting carriers with rates, terms, and conditions that the latter have been entitled to by the Act and State and federal regulations – a common, but hardly the only, example has been delays in honoring opt-in requests. It is extremely ironic, but hardly surprising, that the RBOCs would have the Commission eliminate or ignore those procedures now when they perceive it would serve their interests.

*3. **Applicability of the Pick-and-Choose Rule and Section 252(i).*** The *RBOC Letter* would have the Commission preclude the use of requesting carrier opt-in rights following the adoption of new unbundling rules in the *Triennial Review* proceeding. The *RBOC Letter* seriously misconstrues the statute in support of that argument, suggesting that a Section 252(i) or Rule 51.809 opt-in request may only be made of interconnection agreement provisions that embody minimum ILEC obligations under Sections 251(b) and (c).[29] The scope of competitors' opt-in rights is much greater than that, as they apply generally to rates, terms, and conditions in agreements "approved under [Section 252]."[30] Negotiated, as well as arbitrated, agreements must be submitted for approval (47 U.S.C. § 252(e)(2)), and negotiated agreements, while dealing with the subject matter of interconnection, network elements, and other services associated with the ILECs' Section 251 obligations, are not bound by the scope of the ILECs' Sections 251(b) and (c) obligations.[31] Accordingly, such negotiated provisions are subject to Section 252(i) opt-ins even if their terms go beyond an ILEC's minimum Section 251 obligations.

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[27] *See* 47 U.S.C. § 252(b)(5) (defining lack of good faith in context of negotiations and arbitration over Section 251(c) obligations).

[28] *See RBOC Letter* at 5-6. Even assuming the Commission's adoption of any new or amended unbundling rules in the *Triennial Review* docket potentially constitute a change of law in certain existing interconnection agreements, many change-of-law provisions in those agreements likely would not be triggered until petitions for reconsideration and appeals have been completed. Again, this matter must be resolved on a case-by-case basis.

[29] *See RBOC Letter* at 6-7.

[30] 47 U.S.C. § 252(i).

[31] 47 U.S.C. § 252(a)(1).

The Commission did not hold otherwise in *Qwest Communications International, Inc,*[32], as the RBOCs suggest.[33] There, the Commission made clear that requesting carriers could opt-into provisions regarding the same subject matter as the Section 251(b) and (c) obligations of ILECs, as well as the "interstitial" provisions needed to implement provisions governing interconnection, network elements, and the like, and rejected Qwest's efforts to limit opt-in rights to a schedule of itemized charges and associated descriptions of services. ;[34] Such provisions subject to opt-in would include, of course, change-in-law provisions, in addition to unbundling obligations of any sort, even if they go beyond the ILEC's minimum regulatory obligations.

Nor is there Commission precedent for "abolishing" Section 252(i) rights, as the *RBOC Letter* advocates.[35] Although the Commission limited opt-in rights in the context of reciprocal compensation provisions as they apply to ISP-bound traffic in its *ISP Remand Order*,[36] the Commission concluded it was able to do so in those limited circumstances because of its finding that such provisions, as they applied to ISP-bound traffic, were governed not by Section 251 or 252. Rather, the Commission found that compensation for ISP-bound traffic was part of "an interconnection compensation regime set by this Commission pursuant to *Section 201*." [37] Unbundling provisions, to the contrary, fall squarely within the scope of the subject matter of Section 251, and the *ISP Remand Order* provides no support to the RBOCs' argument.[38]

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32 Memorandum Opinion and Order, 17 FCC Rcd 19337 (2002).

33 *See RBOC Letter* at 7.

34 *Qwest Communications International,* 17 FCC Rcd at 19341. Thus, the Commission held, for example, that dispute resolution and escalation provision related to the types of obligations found in Sections 251(b) and (c) fall within the scope of Section 252(a) agreements that must be filed with the State Commissions and "are appropriately deemed interconnection agreements." *Id.* For similar reasons, change-of-law provisions related to those same obligations "are appropriately deemed interconnection agreements" subject to Section 252 filing and opt-in procedures. *See also Global NAPs, Inc. Petition for Preemption of the NJ BPU Regarding Interconnection Dispute With Bell Atlantic-New Jersey, Inc.*, 14 FCC Rcd 12530, 12534 n. 26 (1999) (rejecting Verizon's arguments that "Section 252(i) only permits carriers to opt-into provisions of interconnection agreements that are based on the requirements of section 251").

35 *RBOC Letter* at 7.

36 16 FCC Rcd at 9174, ¶ 52. This determination was rejected by the D.C. Circuit in its review of the *ISP Remand Order*, but the point remains that the Commission's moratorium against opting into reciprocal compensation provisions to the extent they might apply to ISP-bound traffic was based upon its finding that compensation for ISP-bound traffic is governed by Section 201.

37 *Id.* (emphasis added).

38 To the extent that change-of-law or contract expiration provisions in an approved agreement are legitimately-related to the unbundling provisions that a requesting carrier may choose to opt-into from that agreement, as they almost always are, such provisions apply to the opted-into unbundling rates, terms, and conditions. The CLEC respondents do not read the *RBOC Letter* (at 7, n.4) to suggest otherwise.

Pursuant to Section 1.1206(b)(1) of the Commission's rules, this written *ex parte* presentation is being submitted to the office of the Secretary electronically. Please associate this letter with the record in the proceedings indicated above.

Respectfully submitted,

Broadview Networks, Inc.
Dominion Telecommunications, Inc.
Eschelon Telecom, Inc.
Grande Communications
KMC Telecom
NewSouth Communications, Inc.
NuVox, Inc.
PACE Coalition
SNiP LiNK LLC
Talk America, Inc.
XO Communications, Inc.
Xspedius Management Co., LLC

cc: Michael K. Powell, Chairman
Kathleen Q. Abernathy, Commissioner
Michael J. Copps, Commissioner
Kevin J. Martin, Commissioner
Jonathan S. Adelstein, Commissioner
William Maher
Tom Navin
Richard Lerner
Scott Bergmann
Nick Bourne
Paula Silberthau
Qualex International
Christopher Libertelli
Matthew Brill
Jordan Goldstein
Daniel Gonzalez
Lisa Zaina
Steve Morris
Rob Tanner
Michelle Carey
Linda Kinney
Mary McManus
Debra Weiner